UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LAMONS GASKET COMPANY, A
DIVISION OF TRIMAS CORPORATION

Employer

And

MICHAEL E. LOPEZ **Case 16-RD-1597**

Petitioner

And

UNITED STEEL, PAPER AND
FORESTRY, RUBBER,
MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION

Union

BRIEF *AMICI CURIAE* OF THE COUNCIL ON LABOR LAW EQUALITY, HR POLICY ASSOCIATION, NATIONAL RESTAURANT ASSOCIATION, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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I. INTRODUCTION

On August 31, 2010, the National Labor Relations Board (NLRB or Board) issued a notice inviting *amicus* briefs to be filed on or before November 1, 2010 addressing whether the Board should modify or overrule *Dana Corp.*, 351 NLRB 434 (2007) using *Rite Aid Store #6473*, Case 31-RD-1578 and *Lamons Gasket Co.*, Case No. 16-RD-1597 as the lead cases. *See* Notice and Invitation To File Briefs, August 31, 2010 (Notice). Since then, on September 17, the *Rite Aid Store #6473* case was settled and Rite Aide withdrew its Request for Review. Therefore, the Board subsequently instructed that briefs are to be filed exclusively under *Lamons Gasket Co.*

The Board's majority decision in *Dana*, (then referred to as *Dana Corp./Metaldyne Corp.*) modified the Board's voluntary recognition bar doctrine as originally announced in *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966). *Keller Plastics* recognized that parties must be afforded time to negotiate an agreement without challenges to the recognized union, including decertification or rival union petitions, for a "reasonable period" without defining what period of time is "reasonable." The Board had "no rules concerning what constitutes a 'reasonable time.'" *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 179 (1996). There was no "bright line" standard to determine when it would be "reasonable" for employees or rival unions to challenge the recognized union's majority support following voluntary recognition. There was no guarantee that a petition for election to test majority support would ever be processed by the National Labor Relations Board.

In *MGM Grand Hotel & Casino,* 329 NLRB 464 (1999), the Board found 356 days (9 days short of a full year) to be a "reasonable" time to bar a challenge to the union's majority status thus effectively converting the limited voluntary recognition bar into the same one-year certification bar granted union representation following a secret ballot union election victory. In *MGM Grand*, the Board gave voluntary recognition where there had been no secret ballot election the same "bar quality" as certification based on a secret ballot election. The frustrated employees in that case unsuccessfully petitioned three times for a secret ballot election; each time their petitions were denied by the NLRB. Eventually, the recognition bar carried over to the 3-year "contract bar" following the execution of a collective bargaining agreement. Thus, the employees in that case were denied the ability to challenge the "recognized" union through a secret ballot election for a total of four years, even though there existed clear evidence that a majority of the employees no longer, if ever, actually supported the "recognized" union.

The Board's majority decision in *Dana* addressed these deficiencies. In fact, *Dana* preserved the bar to decertification or rival union petitions following voluntary recognition. However, under *Dana* two conditions must be met before the recognition bar will apply. First, the affected employees must receive adequate notice of the employer's voluntary recognition (obviously important where the employer has agreed to neutrality in recognizing the union), in the form of a "*Dana* notice" alerting them of their rights to file a petition for an election. Second, if 45 days pass from the date of a "*Dana* notice" without the filing of a valid petition, the recognition bar thereafter attaches.

Therefore, the majority's decision in *Dana* also protects the important right of employees to have their properly-presented petitions for secret ballot elections processed by the NLRB's Regional Directors following voluntary recognition. In *Dana*, the Board directs that the petitions

"shall" be processed by the Board's Regional Offices which, before *Dana*, was a questionable proposition at best as a result of the uncertainty as to what constitutes a "reasonable period" for bargaining. *Dana* also is designed to minimize other strategic obstacles that were placed in the way of decertification petitions by the recognized union such as the filing of frivolous unfair labor practice charges to prevent the processing of election petitions.

II. INTEREST OF THE *AMICI CURIAE*

The *Amici* trade associations and professional organizations identified below all have member companies which have entered into voluntary recognition agreements, or who in the future may seek to enter into such relationships, and therefore have experience with and significant interest in the issues raised in this proceeding.

The Council on Labor Law Equality (COLLE) is a national association of employers formed to comment on, and assist in the interpretation of the law under the National Labor Relations Act. Through the filing of amicus briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach in the formulation and interpretation of national labor policy on issues which affect a broad cross-section of American industry. COLLE is the Nation's only brief-writing association devoted exclusively to issues arising under the National Labor Relations Act and thus, since its founding, COLLE has filed amicus briefs and participated in oral arguments in virtually every significant case before the NLRB and the federal courts of appeals, including the U.S. Supreme Court.

The HR Policy Association represents the chief human resource officers of over 300 of the largest employers doing business in the United States. Collectively, its member companies

employ over 19 million people worldwide and over 12 percent of the U.S. private-sector workforce. Since its founding in 1969 (as the "Labor Policy Association"), the Association's principal mission has been to ensure that laws and policies affecting human resources are sound, practical and responsive to the realities of the modern workplace. To that end, the HR Policy Association provides its members, policy-makers, courts, agencies and the public with in-depth information, analysis and opinion regarding current situations and emerging trends in labor and employment policy.

The National Restaurant Association (NRA) is the leading business association for the restaurant and food service industry. NRA membership includes foodservice establishments, restaurants and hotels, some of which have certified bargaining representatives currently representing their employees. The industry is comprised of 945,000 restaurant and foodservice outlets employing 12.7 million people, making it the nation's second-largest private-sector employer.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

III. ISSUES PRESENTED

The issues presented in *Lamons Gasket Company* are not new. Each of the four *Amici* here filed briefs in the original *Dana Corp. /Metaldyne Corp.* case. We believe that our arguments are as valid now as they were then.

We strongly argued in *Dana Corp. /Metaldyne Corp.* that in light of significant changes in labor relations practices through the increased use of voluntary recognition based on card checks, employees should be given the realistic opportunity to challenge a union's majority status following voluntary recognition by being able to file a petition for a Board-supervised decertification election, and to have that petition processed. Some argued that the voluntary recognition bar should be abolished entirely. Others argued that whenever voluntary recognition was based on card checks the Board should allow petitions for secret ballot elections to test the reliability of the card-signing process.

The paramount goal of the National Labor Relations Act is to protect the right of employees to exercise free choice either for or against union representation. That purpose, we argued, is best served by honoring employees' right to vote in a Board-supervised secret ballot election. That does not suggest that voluntary recognition is not also an important, legitimate means of gaining union representation based on card checks; it merely indicates that where there is doubt as to the union's continuing majority status, a secret ballot election is the preferred and more reliable method of determining employees' sentiments. The goal of industrial stability is also best served by allowing employees to test the union's majority support in a Board election. Holding an election will either reveal and correct an inherent instability in the bargaining unit, or it will engender greater stability by confirming the union's representative status.

We also argued *Dana Corp. /Metaldyne Corp.* that the so-called "tension" between employee free choice and contract stability was misplaced in this context, since absent majority support of the employees for the "recognized" union, there could be no stability in collective bargaining. Denying that employees a secret ballot election, we argued, only causes the underlying instability to persist and fester. The decertification petition reflects that the

relationship is already unstable and, as the Board held in *MV Transportation*, 337 NLRB 770 (2002) "fail[ing] to resolve the issue with a Board-conducted election simply aggravates the instability further." *Id.* at 774.

We noted that the decertification process had been elusive, if not to say frustrating, since petitions were rarely processed, frequently delayed, and often were blocked by whatever alleged "blocking charge" was filed almost without regard to the frivolity of the charge.

Moreover, we asserted, the result was that what the Board considered a "reasonable period" for a voluntary recognition bar often morphed into the "certification bar" lasting as long and given the same "bar quality" as certification supported by a Board-supervised secret ballot representation election. Indeed, we cited numerous decisions where the employees' desires were frustrated and the recognition bar was extended to a full year or more, despite several employee petitions for a decertification election filed by well more than a majority of the unit employees. See, e.g., *MGM Grand Hotel*, supra (365 days was a "reasonable period"). The problem was that the Board had no bright line test, "no rules concerning what constitutes a 'reasonable time.'"

We argued that all authorities – the Board, the federal courts, including the Supreme Court, Congress, and even unions – agree that NLRB-supervised secret ballot elections were more protective of employee rights and, for that reason, were preferable to card check designations as more reliable indicators of true employee sentiment. That is especially true where the employer has agreed to remain "neutral" and not to oppose or campaign against the union.

The union should have nothing to fear from a secret ballot election where, in fact, the employer has agreed not to campaign (or even has agreed to speak positively of the union), if the recognized union was confident of its majority status in the first place. Where the union is not

confident of its majority status, however, that is precisely the time when a secret ballot election, rather than a card check process, would be most important and should be conducted.

The cost to the union of testing its majority support in a Board election should be minimal. If the union truly has the support of a majority of the employees in the bargaining unit, holding an election would only confirm the legitimacy of the union's representative status. Meanwhile, the employer's duty to bargain with the union would continue uninterrupted during the election process. The filing of a decertification petition would not relieve the employer of its duty to bargain based on the card check recognition. The duty to bargain would cease only if the Board determines that the union does not, in fact, enjoy majority support.

Since the filing of our briefs in *Dana Corp. /Metaldyne Corp* , our positions have not changed, although the composition of the Board and the new Board majority certainly has. Now, however, the new Board majority may soon return to the same legal and procedural quagmire of uncertainty and unfairness of the old *Keller Plastics* rule, perhaps even without a bright line definition of what constitutes a reasonable period for a recognition bar to last from the date of voluntary recognition. The actual experience after three years following the Board's *Dana* decision reflects that "*Dana* notices" are reasonable and have not been misused in practice. It would be an abrogation of its duty and of its public trust if the NLRB simply were to turn its back on employees who have petitioned for a secret ballot decertification election. Employees' right to choose to petition for secret ballot elections, whether for initial union certification or to decertify a previously recognized union, enjoys the same protected status as their right to choose whether to engage in or refrain from union representation and lies at the core of Section 7 rights.

The Board, of course, certainly has the authority to reverse precedent, and swing the pendulum back in the opposite direction. However, as we explain below, that authority is not

without limits. In *S & F Market Street Healthcare, LLC v. NLRB*, 570 F. 3d 354 (D.C. Cir. 2009), the court recognized that departure from Board precedent requires a "reasoned justification." (citing *Mail Contractors of America v. NLRB*, 514 F. 3d 27, 31 (D.C. Cir. 2008)).

Although there is authority supporting the proposition that a change in administration may justify a reversal of precedent, we doubt that the courts will accept a complete flip-flop after such little experience with the rule on so fundamental an issue as the ability to effectively exercise employee free choice. The change in political composition alone should not be sufficient cause to reverse precedent absent changed factual circumstances or other mitigating factors sufficient to support a "reasoned justification" for such a reversal.

We contend that nothing has changed factually since *Dana* was decided other than the ability of employees to exercise their rights under the Act following voluntary recognition, and that experience with *Dana* notices have not revealed great flaws in the process. Those who argue that "the sky is falling" because employees are given the right to vote in a secret ballot election will be hard pressed to support that contention based on anything other than anecdotal tales. We maintain, therefore, as argued below, that *Dana* should not be overturned.

Dana should be preserved. However, if the new Board refuses to do so we suggest that it should consider how it will determine based on an objective standard if card signing was properly solicited, and whether it can identify a bright line standard for determining a "reasonable period" within which it may deny employees the right to vote in a secret ballot election, and what it will do to prevent the strategic and disingenuous filing of frivolous 'blocking charges' from being used as a method of denying employee voting rights.

IV. SUMMARY OF THE ARGUMENT

We do not attack voluntary recognition. We recognize that voluntary recognition is neither illegitimate nor novel. We do not challenge the legality of voluntary recognition. In fact, we recognize that voluntary recognition has been long accepted by the Board, (*See*, *Rockwell International Corp.*, 220 NLRB 1262, 1263 (1975)), and that Board policy has been to promote voluntary recognition. See, *Seattle Mariners*, 335 NLRB 563, 564-65 (2001). And we acknowledge the dramatic increase in voluntary recognition agreements throughout the country, including those involving a number of the *Amici's* member companies, to a degree where it someday may surpass Board-supervised secret ballot elections as the most frequently employed method for establishing union representation and collective bargaining.

It is for those reasons that we believe *Dana* is well decided and should not be overturned. If employers and unions are free to voluntarily establish a bargaining relationship, as we concede they should be permitted to do, it must be only on the basis of the free will of a majority of the affected employees without coercion or intimidation. Absent employee free choice, the basis for contract stability simply does not exist.

It is universally recognized – not just by employers, but by unions, the Board, the Supreme Court and Congress – that an NLRB-supervised secret ballot election is the most accurate method of determining employees' support for a union. It is beyond serious argument that where the employer agrees to recognize the union and there is no employer campaign since the employer has agreed to remain neutral, a Board-supervised secret ballot election is a more reliable method of determining whether employees truly want third-party representation than the simple signing of authorization cards. The card check process lacks the same degree of privacy as a secret ballot election and employees are susceptible in the card check process to group/ peer

pressure. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 594 (1969); *NLRB v. Cayuga Crushed Stone*, 474 F.2d 1380, 1383 (2d Cir. 1973); *General Shoe Corp.*, 77 NLRB 124, 127 (1948).

In requiring a notice to employees of their employer's voluntary recognition of a union, and affording those employees a limited opportunity to petition for an election before the voluntary recognition bar attaches, the Board majority in *Dana* sought "to strike the proper balance between two important but often competing interests under the National Labor Relations Act. Those allegedly competing interests are 'protecting employee freedom of choice on the one hand, and promoting stability of bargaining relationships on the other.'" *Dana*, supra, at 434 citing *MV Transportation*, 337 NLRB 770 (2002). Clearly, the Board's efforts to "promote" collective bargaining must not take priority over the Board's first duty to ensure employee free choice regarding whether to be represented by a union or by a particular union in the first place. *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272, 277 (1978); *Dana*, supra at 434.

It seems apparent, however, that the current Board majority intends to do just that: overrule *Dana* and return to the ambiguous standard of *Keller Plastics*, supra, thereby inverting stability of collective bargaining as a right superior to that of employee free choice.

Certainly, not every card check recognition agreement is forced or tainted by union coercion, intimidation or third party misconduct. But just as certainly, not every voluntary recognition agreement is free from coercion exerted against either employers to "voluntarily" recognize the union, or against employees to sign union authorization cards, or both. Even if such abuse rarely occurs, the Board should not abdicate its obligation and its proud history of ensuring employees a free choice in selecting whether or not to be represented by a labor organization. Secret ballot elections actually support the Board's role in promoting stability of

collective bargaining relationships since without employee free choice at the outset there can be no stability thereafter in subsequent collective bargaining relationships.

The *Amici* do not challenge the underlying legality of voluntary recognition agreements. We recognize that some employers have extensive, long-standing, and for the most part successful collective bargaining relationships premised on voluntary recognition based on a showing of an uncoerced majority of employees. We recognize that entering into a voluntary recognition agreement is a permissible and legitimate right of employers and labor unions who wish to establish a collective bargaining relationship without the disruption of an organizing campaign. Indeed, voluntary recognition should be encouraged where collective bargaining is deemed by the parties -- employers and unions -- to be in their own self interests; but it cannot and should never be entered into contrary to the voluntary, freely-given support of the employees affected by the collaboration between their employer and a union. The Board has recognized the validity of voluntary recognition agreements based on a showing of an uncoerced majority of employees. *Houston Div. of The Kroger,* 219 NLRB 388 (1975).

Yet, *Amici* also recognize the role of union "corporate campaigns" and other economic weapons designed to force employers into agreeing to not so "voluntary" recognition agreements. See, *New Otani Hotel & Garden,* 331 NLRB 1078 (2000) (RM petition denied because union tactics sought only a card check agreement and was not a demand for recognition); *Food Lion v. United Food and Commercial Workers Int'l Union,* 103 F.3d 1007, 1014 n. 9 (D.C. Cir. 1997); *Diamond Walnut Growers v. NLRB,* 113 F 3d 1259 (D.C. Cir. 1997), *cert. denied,* 118 S. Ct. 1299 (1998) (generally discussing union corporate campaign tactics).[1]

[1] By now, union corporate campaign tactics are well documented by academics and the courts. See, Jarol Manheim, "The Death of a Thousand Cuts: Corporate Campaigns and the Attack on the Corporation (Lawrence Erlbaum Assoc., 2001). See also Yager and LoBue, "Corporate Campaigns and Card Checks: Creating the Company Union

The National Labor Relations Act is designed to protect employees – not unions or employers – in the freedom to associate or not associate with a union. Section 7 of the National Labor Relations Act protects employees, not unions or employers who are not even mentioned in the statutory language of that section. Thus, while *Amici* decry the use of coercive corporate campaigns and maintain that corporate campaign tactics are an illegitimate abuse of union power, that's a battle for another day. For purposes of voluntary recognition agreements, *Amici* insist that only where representation is truly supported by an uncoerced majority of employees, who freely and voluntarily support the union, is it appropriate for a voluntary recognition bar to exist which prevents legitimate challenge to majority status while the parties are negotiating a first contract. Where employees are given notice of voluntary recognition, they should have the right to petition for an election, and their petition should be processed by the National Labor Relations Board. Especially in cases where the voluntary recognition arose out of a card check and neutrality agreement, and the employees were not exposed to a contested election where they were fully informed prior to making a decision for or against the union, employees should receive *Dana* notices. where if they so choose, the affected employees have the right to petition for a Board-supervised secret ballot election. *Dana* notices also help voluntary recognition agreements to approach the level of "arms length" agreements which would negate any appearance of impropriety that might otherwise violate Section 8(a)(2) of the Act.

Rather than simply eliminating all voluntary recognition agreements in favor of card checks (which we doubt this Board would do anyway) or going to the opposite extreme of simply discarding the positive benefits of the *Dana* decision when employees seek an election to test the recognized union's majority status, the current Board perhaps should consider fine-

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of the Twenty-First Century," 24 Employee Relations Law Journal 4 (1999); Herbert R. Northrup, Union Corporate Campaigns" (Wharton School, Industrial Research Unit, 1987).

tuning the process -- the wording of the *Dana* notice, the time frame within which employees may petition for an election following voluntary recognition, , determining the parameters of a "reasonable period," eliminating artificial barriers to decertification petitions and elections, etc.

But, the *Amici* insist, it would be irresponsible for the new Board majority simply to overturn *Dana* and return to the status quo ante of *Keller Plastics*. To do so would be an admission that the new Board majority is prepared to abdicate its role in protecting employee free choice and the Board's historic preference for secret ballot elections as the preferred method of determining employee sentiment, especially where such sentiment is challenged or in doubt by the affected employees without intervention or pressure from the employer. Never again should the Board allow thousands of frustrated employees who petitioned three times for an election following voluntary recognition only to be denied that opportunity for 356 days (what the Board described as a "reasonable period") as if they had supported the union through a secret ballot election, and then to be locked in for another three years as a result of the contract bar, to a union that they apparently never wanted in the first place. See *MGM Grand Hotel, Inc.,* 329 NLRB 464 (1999). Those days should be over.

Finally, there is no empirical evidence on which to overturn *Dana.* The decision three years ago was based on a dramatic evolution in industrial relations driven by the increase in card check recognition and the corresponding decrease in Board certification following secret ballot elections. There is no evidence that the change has abated, just as there is no empirical evidence that the adverse consequences predicted by unions as a result of *Dana* have ever occurred. In short, there is no rational basis for overturning *Dana* other than the change in the Board's political composition, which should not be enough to justify a change in policy so soon after it was enacted.

V. ARGUMENT

A. EMPLOYEE FREE CHOICE IS THE SINE QUA NON TO CONTRACT STABILITY

The right of employees to freely choose their collective bargaining representative is the fundamental goal of the National Labor Relations Act and the fundamental purpose of the National Labor Relations Board, without which the other rights and protections have little meaning. Employee free choice is paramount to achieving labor stability in the workplace. Voluntary unionism is the predicate for collective bargaining, contract administration, grievance handling, and every other relationship between the affected employees and their selection of exclusive bargaining relationship. Absent a free election and freely chosen representatives, there can be no contract stability. See *Pattern Makers League v. NLRB*, 472 U.S. 95, 102-03 (1985); *Skyline Distributors v. NLRB*, 99 F.3d 403 (D.C. Cir. 1996). The greater the uncertainty regarding the accuracy or legitimacy of such selection, the greater the uncertainty regarding the stability of the collective bargaining relationship between the employer and the union.

B. CARD CHECKS SUPPORTING VOLUNTARY RECOGNITION AGREEMENTS SHOULD NOT BE ACCORDED THE SAME DEFERENCE UNDER BOARD POLICY AS A SECRET BALLOT ELECTION

As originally enacted in 1935, the Wagner Act permitted the NLRB to resolve representation questions through a "secret ballot of employees" or "any other suitable method." Between 1935 and 1947, it was estimated that card checks – one of the "other suitable methods" – were used in 20 percent of the representation cases that the Board handled. In fact, the recognition bar was recognized by the courts, including the Supreme Court. *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944) ("a bargaining relationship once rightfully established must be

permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Id.* at 705-06).

Yet, even under the Wagner Act, there was an original congressional preference for secret ballot elections. As Senator Wagner stated:

> "[A]s to ... representation of the workers you cannot have any more genuine democracy than this. We say under Government supervision let the workers themselves ... go into a booth and secretly vote, as they do for political representatives in a secret ballot, to select their choice."

Then, in 1939, still under the Wagner Act, the Board announced that as a matter of Board policy it would no longer accept union authorization cards as a "suitable method" of determining employee sentiment, stating in *Cudahy Packing Co.*, 13 NLRB 526 (1939), that it was acting "[I]n the interest of investing...certifications with more certainty and prestige by basing them on free and secret elections conducted under the Board's auspices." Id. at 531-32. See also *Joe Hearin Lumber*, 66 NLRB 1276, 1283 (1946) (where the Board stated that it did "not feel ... that a card check reflects employees' true desires with the same degree of certainty" as a secret ballot election).

With the passage of the Taft-Hartley Act in 1947, Congress eliminated the phrase "other suitable methods" from the language of the Act and made secret ballot elections the prerequisite for Board certification, effectively prohibiting the Board from certifying a union based on the card check method even when the employer and union both consent to the procedure.

As the Supreme Court observed in *NLRB v. Gissel Packing Co.*, supra:

> "The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory – indeed the preferred – method of ascertaining whether a union has majority support."

Thereafter, in *Linden Lumber Division Summer & Co. v. NLRB*, 419 U.S. 301, 307 (1974) the Court ruled unequivocally that employers could not be required to recognize a union without a secret ballot election unless the election process itself was tainted by an employer's unfair labor practices. That decision, as written by noted liberal Supreme Court Justice William O. Douglas, reinforced the inherently unreliable nature of card checks and stated that "in terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored."

In subsequent years, the Board and the federal courts, including the U.S. Supreme Court, have consistently endorsed the "solemnity" of a secret ballot election as the "crown jewel" of Board procedures. *See Ray Brooks v. NLRB*, 348 U.S. 96, 99 (1954). As stated above, the Court in *Gissel* emphasized that "secret ballot elections are generally the most satisfactory, indeed the preferred method of ascertaining whether a union has majority support." *Gissel,* 395 U.S. at 602. In fact, the Court went further, noting the "inherent" unreliability of union authorization cards:

> "The unreliability of the cards is not dependent on the possible use of threat … It is inherent as we have noted, in the absence of secrecy and the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees."

Id. at 602 n.20 (citing with approval *NLRB v. S.S. Logan Packing Company*, 386 F.2d. 562, 566 (4th Cir. 1967)).

The Court reaffirmed the latter view in *Linden Lumber* supra, stating that "the policy of encouraging secret ballot elections under the Act is favored." Id. at 307.

The same sentiments have been echoed consistently by the Board. See, e.g., *Levitz Furniture Co. of the Pacific, Inc.,* 333 NLRB 717, 723 (2001) ("we emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions"); *Underground Services Alert of Southern California,* 315 NLRB 958, 960-61 (1994)

(quoting with approval Member Oviatt's separate opinion in *W.A. Krueger Co.*, 299 NLRB 914, 931 (1990) ("The election, typically, also is a more reliable indicator of employee wishes [than card checks]).

Even unions have expressed a preference for secret ballot elections. For example, a 1961 union handbook for organizers noted: "[C]ards are at best a signifying of intention at a given moment. Sometimes they are signed to 'get the union off my back.'"

More recently, in 1988 the AFL-CIO, the United Auto Workers (UAW), and the United Food and Commercial Workers (UFCW), in the context of supporting a decertification election, argued to the NLRB:

> a representation election 'is a solemn ...occasion, conducted under safeguards to voluntary choice,' ... other means of decision-making are 'not comparable to the privacy and independence of the voting booth,' and [the secret ballot] election system provides the surest means of avoiding decisions which are 'the result of group pressures and not individual decision[s].' In addition ... less formal means of registering majority support ... are not sufficiently reliable indicia of employees' desires on the question of union representation to serve as a basis for requiring union recognition.

The Board should not overrule *Dana*, supra. The cure for whatever objections the current Board majority has with the decision should come through rewording the 45-day notice to state a more objective standard, without compromising employee free choice. If employers agree to maintain "neutrality" and voluntarily recognize a union based on a majority of signed cards, and if their employees truly desire union representation as reflected by a card showing signed by a majority of employees, the recognized union should have no fear of a secret ballot election held shortly thereafter, especially where the employer has agreed not to campaign against the union. If a union cannot hold its majority for at least 45 days from the date the *Dana*-notices are posted one must question whether it ever had majority support in the first place. It hardly would be a positive foundation on which the parties can construct stable collective bargaining.

One of the Board's most important functions in support of collective bargaining is to ensure that the selection of bargaining representatives is done under what has been described as "laboratory conditions." Few will argue that secret ballot elections are not superior indicators of true employee sentiment than card check or other mechanisms. The Board cannot and should not abdicate its responsibility to ensure fair selection of representatives. While most voluntary recognition agreements supported by a majority of signed union authorization cards may be entirely uncoerced, even if a minority of those are tainted by objectionable or unfair labor practice conduct the Board cannot turn a blind eye, or point to the costs of *Dana* elections as not worth the effort.

In her concurring opinion below, Chairman Liebman questions the continuing need for the *Dana* rule in light of the relatively infrequent challenge to a union's majority status following voluntary recognition (in her words "the rarity of *Dana* elections, and the even greater rarity of cases where employees reject the [voluntarily] recognized union ..."). By analogy, she argues that perhaps *Dana* elections should be eliminated just as the Board's policy on employee referenda to decide whether unions were authorized to negotiate union-security clauses in collective-bargaining agreements was eliminated when experience revealed that the authorizations were approved 97% of the time. So, in place of the referenda, which were authorized under the 1947 Taft-Hartley Act amendments, the Board allowed employees to seek a Board election to rescind a union's authority regarding an existing union-security clause.

Here, however, by discarding *Dana* elections the Board would eliminate elections in favor of card checks rather than eliminating "referenda" in favor of elections.

Also, there is little, if any evidence to support the predictions of the amicus AFL-CIO filed as part of the UAW's Brief on Review in its original *Dana* brief that weakening the

recognition bar would have an irreparable effect on first contract collective bargaining. . There the unions argued that "it takes time for collective bargaining to bear fruit for employees" because, citing the Board's decision in *The Ford Center For the Performing Arts*, 328 NLRB 1 (1998), first contract bargaining has the attendant problems of establishing initial procedures, rights, wage scales, and benefits." 328 NLRB at 1. In the unions' words, "everything is on the table in first contract negotiation" therefore justifying up to a full year of uninterrupted bargaining. See *Lee Lumber and Building Material Corp.*, 334 NLRB 399, 403 n.40 (2001) (the average time required to conclude negotiation of a first contract is almost one year). The irony is that the unions insist on a recognition bar which would bar interruption for up to a year or longer for first contracts, while at the same time arguing in Congress in support of the Employee Free Choice Act for mediation after only 30 days and then binding compulsory first contract interest arbitration of first contracts after only a total of four months (120 days) without agreement. The hypocrisy in the union's argument is obvious. The union would have it so that on the one hand where employees seek a secret ballot decertification vote on first contracts where recognition has been based on card counts rather than secret ballots unions should be given all the time they need for delaying the election. On the other hand, unions would have it that where first contracts are not executed in a relatively short time frame the federal government should step in to write the contract.

The same irrational logic would impel the Board to revise its rules so that certification elections would be required within a week or two from the date of the union petition, rather than the current 38 days, while allowing decertification petitions to languish or not even be processed.

C. ABSENT THE PROTECTIONS IN *DANA*, THE POTENTIAL FOR SECRET BALLOT ELECTIONS TO TEST SUPPORT FOR A "RECOGNIZED" UNION WILL RETURN TO AN ILLUSORY RIGHT

Another reason the *Dana* decision should be preserved is the history of the Board in processing decertification petitions. As a result of a series of Board decisions over the past several decades, a quite disturbing pattern has emerged: it has become virtually impossible for any party (the employees, the employer, or a rival union) to challenge a union's majority status once recognition has been granted. Because it has become so difficult to challenge an incumbent union, recognition on the front end should not be given "bar quality" when it is granted pursuant to a neutrality/card check agreement. If 30 percent of employees believe that the union does not, in fact, have majority support at the time recognition is granted or shortly thereafter, and before a contract is reached, the representation question should be put to the immediate test of an NLRB election.

The effect of applying the recognition bar in cases involving a neutrality/card check agreement can extend well beyond the one-year bar found in *MGM Grand*, and possibly as long as four years. If an initial collective bargaining agreement is reached before the recognition bar expires, the contract bar will block an election for up to three additional years. In many cases, the neutrality/card check agreement ensures that an agreement will be in place before the recognition bar expires, by mandating interest arbitration if the parties are unable to negotiate a first contract within a certain period of time after recognition has been granted. Therefore, if a recognition bar is applied in these cases, employees will be unable to challenge the union's majority status for up to four years. Cf. *MV Transportation*, 337 NLRB at 773 ("It is possible, however, that the successor bar could preclude the employees' exercise of their Section 7 rights for as long as several years ..." if a new agreement is reached during the bar period).

Moreover, since the union selects the employees from whom it seeks card signing in support of a voluntary recognition agreement, the union can screen out likely dissenters to the card signing but who nonetheless will be subsequently represented by the union as their exclusive bargaining representative. Thus, employees who expressed opposition to unionization in the past could be "carved out" from card signing, thus preventing full and open discussion and the free exchange of ideas regarding unionization as authorized under Section 8 (c) of the Act.

1. Three Fundamentally Different Considerations Where the Board Requires Bargaining: the "Certification Bar," "*Gissel*," and the "Recognition Bar."

Of the three situations where the Board requires a reasonable period for bargaining prior to any challenge to the union's status, the "recognition bar" occupies a special and less protected status.

First, certification by the Board following the more reliable Board-supervised secret ballot election deserves a lengthier period of insulation from challenge simply because the election results are more reliable than voluntary recognition based on card checks. Thus, after a union is certified it is entitled under Board law to an unrebuttable presumption of majority support for a period of one year while the parties are negotiating a first contract. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37 (1987).

Second, when an employer is ordered to bargain with a union pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), it is the result of the employer's hallmark unfair labor practices during the organizing campaign which would make a fair election impossible. As a result, bargaining must continue for a reasonable period of time prior to any withdrawal of

recognition or the filing of a petition challenging the union's status. See *Williams Enterprises, Inc.*, 312 NLRB 937, 938 (1993), enf'd, 50 F.3d 1280 (4th Cir. 1995).

In the case of the one-year certification bar, the results of the secret ballot Board-supervised election are more reliable than card checks for voluntary recognition and there is an opportunity following the election for the losing party to file objections or test certification following a refusal to bargain. In the case of the affirmative *Gissel* bargaining order, clearly to remedy the employer's egregious unlawful conduct requires a reasonable period of time for bargaining.

Yet the third situation where the Board requires a reasonable period of bargaining – the "recognition bar" – enjoys neither the assurance of a Board-supervised secret ballot election nor the opprobrium of employer misconduct. It is for that reason that *Dana* provides a viable alternative. Prior to *Dana,* not only was a "reasonable period" following voluntary recognition undefined, it also often morphed into the one-year period for the certification bar and thereafter the 3-year "contract bar." *Auciello Iron Works v. NLRB*, 517 U.S. 781 (1996) ("contract bar").

2. The Recognition Bar Is Placed on Par with the Election Bar – *MGM Grand*

In *MGM Grand Hotel, Inc.*, supra, the Board affirmed the dismissal of a decertification petition that was filed 356 days (i.e., nine days less than a year) after the union was recognized by card check. This was the third decertification petition filed by employees in the twelve months following the employer's recognition of the union. The Board agreed with the Regional Director that "a reasonable time to bargain had not yet passed by the time each of the three petitions was filed." *Id.* at 466. Although the Board said that the recognition bar "is not measured by the number of days or months spent in bargaining," (see *id.*) the effect of the

Board's decision in *MGM Grand* was to bar an election for at least the same period of time – one year – as if the union had been certified by the Board following a secret ballot election.

Members Hurtgen and Brame dissented from the decision in *MGM Grand*. They each argued that the Board's application of the recognition bar unduly restricted employees' Section 7 rights in the name of industrial stability. Member Hurtgen explained that, in balancing these two competing policy goals, greater weight should be given to employees' Section 7 right to reject or retain their bargaining representative:

> This case, and others like it, require a balance between (1) giving the employer and union a reasonable opportunity to reach a collective-bargaining agreement and (2) protecting the Section 7 rights of employees to reject or retain the union as their representative. While the first factor represents a policy choice, the latter one is expressly in the Act, and indeed lies at the heart of the Act. Thus, while I agree that balancing is required … the Act compels me to be especially sensitive to the second factor.

Id. at 468.

> Member Brame expressed the same view in his dissenting opinion:
>
> Employees' Section 7 rights comprise the core of the Act and, in applying the balancing process, the Board must show special sensitivity toward employees' rights.

Id. at 472.

The *MGM Grand* decision was one of several Board decisions preventing employees from exercising their section 7 rights to an NLRB-conducted secret ballot election to test union support following a card check voluntary recognition agreement. It would not be the last.

3. The Recognition Bar Is Applied Despite a Contemporaneous Showing of Disinterest in the Union – *Seattle Mariners*

The Board in *Seattle Mariners*, 335 NLRB 563 (2001), held that the recognition bar applied even when, at the time the union was recognized by card check, a substantial minority (more than 30%) of employees had signed a petition to demonstrate that they did not want to be

represented by the union. The employees sent this petition to the arbitrator who was presiding over the card check. Although the petition was sent two days before the card check, the arbitrator did not receive the petition until after he had completed the card check and certified that the union had majority support. When the employees then filed a decertification petition, the Board held that the recognition bar applied and dismissed the petition.

In dismissing the decertification petition in *Seattle Mariners*, the Board distinguished its decision in *Smith's Food & Drug Centers, Inc.*, 320 NLRB 844 (1996). In *Smith's Food*, the Board held that an employer's voluntary recognition of a union does not bar a petition filed by a rival union that had the support of 30% of unit employees at the time recognition was granted. Surprisingly, the Board in *Seattle Mariners* held that a 30% showing of interest by a rival union is fundamentally different than a 30% showing of interest in no union representation:

> [W]hen, like here, only one union is organizing the employees and, upon demonstration of the union's majority status, the employer voluntarily recognizes the union, an exception to the recognition bar is not warranted. That is, in contrast to the rival union organizing situation presented in Smith's Food, where only one union is engaged in organizing an employer's employees, voluntary recognition by the employer of that union upon a demonstration of its majority status only serves to effectuate employee free choice.

Seattle Mariners, 335 NLRB at 565 (emphasis added).

Chairman Hurtgen dissented, and disagreed with the majority's distinction between employees' right to choose between rival unions and employees' right to choose between a union and no union. Chairman Hurtgen noted that the "very rationale in Smith's Food ... 'to guarantee employees an opportunity to express their genuine desires in selecting their bargaining representative' – is equally as applicable to the instant case." *Id.* at 566. Therefore, Chairman Hurtgen urged that when a substantial minority (30% or more) of employees have expressed a contrary view at the time recognition is granted, the recognition bar should not preclude those

employees from testing the union's majority support through a Board-administered secret ballot election.

The majority, of course, rejected this approach, stating that: "we believe that by dismissing the instant petition, we are both promoting voluntary recognition and effectuating the free choice of the majority of the unit employees." *Id.* at 565. Thus, the Board majority readily admitted that it was denying employees the right to a Board-conducted secret ballot election in order to promote voluntary recognition.

D. *DANA* RECOGNIZES THE REALITIES OF CONTEMPORARY INDUSTRIAL RELATIONS; THERE IS NO COMPELLING REASON WHICH HAS EMERGED TO JUSTIFY OVERTURNING THE DECISION

Dana was issued because of a dramatic shift in industrial relations with the substantial increase in card check recognition agreements and the corresponding decrease of Board-conducted secret ballot elections as the more frequently exercised method of determining union representation. Since issuance of *Dana*, that trend has continued. Thus, the changing factual circumstances that drove the decision in *Dana* continue to evolve in a direction supporting that decision. Unions continue to tout neutrality card check recognition as the wave of the future, backed either by corporate campaign pressures or the threat of labor law reform legislation in Congress. See Adrienne E. Eaton and Jill Kriesky, "Union Organizing under Neutrality and Card Check Agreements," 55 Ind. & Lab. Rel. Rev. 42 (2001); Eaton & Kriesky, "Dancing with the Smoke Monster: Employers Motivations for Negotiating Neutrality and Card Check Agreements" (Sept. 2002). The Chairman of the NLRB herself acknowledges the fact that unions have abandoned the Board in favor of card check recognition –and the fact is there are fewer and fewer Board-supervised secret ballot elections in favor of card check recognition.. A

former Member of the Board questioned whether the Board was pushing policies which, if adopted, would result in its obsolescence. Charles I. Cohen, "Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?" The Labor Lawyer (Fall 2000).

There is no substantive evidence on which to base a reversion of Board policy to the *Keller Plastics* standard: no empirical evidence of contract instability, no increase in refusals to bargain or surface bargaining during the 45-day window period for *Dana* notices, no increase in "run-out the clock" dilatory bargaining, no increase in strikes. In fact, strikes continue to decline.

So, too, there is no compelling legal justification for such a change. Charges filed against employers for section 8(a)(5) violations have remained static since the *Dana* decision.

In fact, overturning *Dana* could create labor instability by whip-sawing unions and employers, a return to the pre-*Dana* standard could cause the type of disruption and labor instability that opponents of the *Dana* decision claim to worry about, this time based on a change in the Board's political composition rather than substantive or legal justification. The widespread contract instability about which we were forewarned would result from *Dana* has not resulted after three years experience. Following the decision, with the exception of perhaps a few anecdotal stories, there has been no evidence of reluctance on the part of labor or management to enter into voluntary recognition agreements.

In sum, *Dana* appropriately balances employee free choice with contract stability. *Dana*'s 45 day notice period provides a narrow but necessary window for employees to test the majority status of a voluntarily recognized union. It is a modest solution to what had become a growing problem. The *Dana* policy should be retained.

RESPONSE TO QUESTIONS RAISED

Amici submit that three years under the *Dana* decision is hardly sufficient experience to draw conclusions as to whether it has been successful or not. Most employers have never attempted to enter into voluntary recognition agreements with a union either before or after the *Dana* decision. Therefore, the relatively slim number of requests for *Dana* notices proves nothing; certainly not that employers are intimidated or discouraged from seeking voluntary recognition as a result of *Dana*. At most, a few anecdotal stories that some parties may advance are hardly a sufficient basis, or "reasoned justification" for reversing Board precedent and overturning *Dana*.

As of August 18, the Agency had received 1,111 requests for voluntary recognition notices. In connection with those requests, 85 petitions were filed, which resulted in the Board's conducting of 54 elections. In 39 of the elections, the voluntarily recognized union prevailed. In 15 elections, the employees voted against the voluntarily recognized union. See VR chart at http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/Dana.xls.

Also, the limited number of *Dana* notices and the even smaller number of decertification petitions, much less elections, is hardly sufficient to justify a change in Board precedent based on administrative costs, especially given the fact that the Board has scheduled fewer and fewer elections of any kind. Certainly, there are far less damaging costs which may be cut rather than denying employees the right to a secret ballot election based on a petition they freely and independently file with the Board. Indeed, to do so not only would be ludicrous, but totally inconsistent with the Board's obligation under the National Labor Relations Act to conduct secret ballot elections to determine employee support for or against union representation.

As the Board stated in its Invitation to file briefs: "Almost a half century ago in *American Cyanamid Co.,* 131 NLRB 909 (1961), the Board stated, "The Board must hold fast to the objectives of the statute using an empirical approach to adjust its decisions to the evolving realities of industrial progress and the reflection of that change in organizations of employees." The Board then described the *Dana* rule as one of those "novel rules, such as those adopted in *Dana*, with which there was no experience at the time of adoption" as making it particularly appropriate to reexamine it.

With that as a backdrop, the *Amici* submit that three years is not enough time to draw any conclusions. Amici, and we suspect most employers, have little empirical data or practical experience concerning the operation of *Dana*, and therefore few responses to the questions posed by the Board. But, if the Board wants to "hold fast to the objectives of the statute," as suggested by *American Cyanamid*, supra, it will hold fast to secret ballot elections as the preferred method of determining employee sentiment and to *Dana* as the best method of assuring majority support for voluntary recognition agreements. See *Levitz*, 333 NLRB 717, 723 (2001).

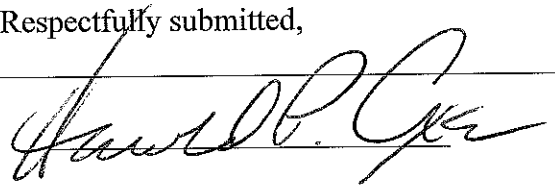
In *Levitz,* for example, the Board requires a higher standard for unilateral withdrawal of recognition, but a lower standard for an RM petition, finding that the best way to determine whether a union has lost majority support, or ever had such support, is through a secret ballot election. *Id.*. In that case, the Board held that an employer could no longer withdraw recognition from an incumbent union bargaining representative absent proof of an actual loss of majority support, but it permitted employers to petition for a Board election based on a less stringent showing of employee disaffection. Also, a 30 percent employee minority in the bargaining unit was free immediately thereafter to challenge the decision of a majority of their colleagues by filing a representation election petition.

Where employees choose to exercise their Section 7 rights following voluntary recognition by petitioning for an NLRB-supervised secret ballot election, the Board should respect their rights and permit them to do so rather than operating to frustrate their desires .

CONCLUSION

For the foregoing reasons *Amici Curiae* – the Council on Labor Law Equality, HR Policy Association, National Restaurant Association, and Society for Human Resource Management – urge the Board not to overturn *Dana*.

Respectfully submitted,



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Dated: November 1, 2010

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LAMONS GASKET COMPANY, A
DIVISION OF TRIMAS CORPORATION

Employer

And

MICHAEL E. LOPEZ **Case 16-RD-1597**

Petitioner

And

UNITED STEEL, PAPER AND
FORESTRY, RUBBER,
MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION

Union

CERTIFICATE OF SERVICE

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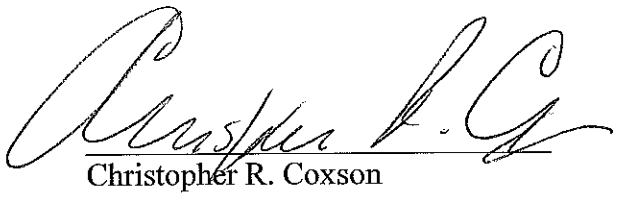

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